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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 SANDRA L.,

9 Plaintiff,

10 v.

11 COMMISSIONER OF SOCIAL SECURITY,

12 Defendant.

CASE NO. C19-6204-BAT

**ORDER REVERSING AND
REMANDING FOR FURTHER
ADMINISTRATIVE PROCEEDINGS**

13 Plaintiff appeals the denial of her applications for Supplemental Security Income and
14 Disability Insurance Benefits. She contends the ALJ erred by miscalculating (1) the medical
15 evidence; (2) plaintiff's testimony; (3) the lay testimony; and (4) residual functional capacity
16 ("RFC"). Dkt. 29. As discussed below, the Court **REVERSES** the Commissioner's final
17 decision and **REMANDS** the matter for further administrative proceedings under sentence four
18 of 42 U.S.C. § 405(g).

19 **BACKGROUND**

20 Plaintiff is currently 57 years old, attended school through seventh grade, and has worked
21 as a hospital cleaner. Tr. 246–47. In November 2016, she applied for benefits, eventually
22 amending her onset date of disability to February 13, 2015, the day after a prior hearing decision.
23

1 Tr. 249, 312–13. Her applications were denied initially and on reconsideration. Tr. 312–88. The
2 ALJ conducted a hearing in September 2018. Tr. 239–89.

3 In a December 2018 decision, the ALJ determined that plaintiff met the insured status
4 requirements through December 31, 2017; had not engaged in substantial gainful activity since
5 the amended onset date of February 13, 2015; and had the severe impairments of chronic
6 obstructive pulmonary disease (“COPD”), cervical spine degenerative disc disease (“DDD”) and
7 degenerative joint disease (“DJD”); benzodiazepine dependence; post-traumatic stress disorder
8 (“PTSD”); depressive disorder; and anxiety disorder with agoraphobia. Tr. 70. The ALJ assessed
9 an RFC of light work with additional physical and mental limitations. Tr. 73. Those mental
10 limitations included understanding, remembering, and applying short and simple instructions;
11 performing routine tasks; making simple decisions; an inability to work in a fast-paced,
12 production-type environment; and tolerance for occasional interaction with co-workers and the
13 general public. *Id.* Concluding that plaintiff could perform jobs that exist in significant numbers
14 in the national economy, the ALJ found plaintiff to be not disabled. Tr. 79–80.

15 Plaintiff submitted additional evidence to the Appeals Council. Tr. 87–238. The Appeals
16 Council disregarded records from Behavioral Health Resources (2 pages) that had already been
17 exhibited; found that the October 2018 psychological/psychiatric evaluation report (5 pages) and
18 August 2018 through August 2019 records from Behavioral Health Resources (147 pages) did
19 not show a reasonably probability of changing the outcome of the decision; and disregarded the
20 May 2019 records from Providence St. Peter Hospital (48 pages) because they post-dated the
21 ALJ’s December 2018 decision and therefore did not relate to the period at-issue. Tr. 2. As the
22 Appeals Council denied plaintiff’s request for review, the ALJ’s decision is the Commissioner’s
23 final decision. Tr. 1–4.

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DISCUSSION

The Court will reverse the ALJ's decision only if it was not supported by substantial evidence in the record as a whole or if the ALJ applied the wrong legal standard. *Molina v. Astrue*, 674 F.3d 1104, 1110 (9th Cir. 2012). The ALJ's decision may not be reversed on account of an error that is harmless. *Id.* at 1111. Where the evidence is susceptible to more than one rational interpretation, the Court must uphold the Commissioner's interpretation. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

Plaintiff argues that the ALJ misevaluated the medical evidence, plaintiff's testimony, the lay testimony, and the RFC. The Court finds that the ALJ did not support with substantial evidence the decision to discount the November 2016 opinion of examining psychologist Kimberly Wheeler, Ph.D., Tr. 1376–80, and the October 2018 opinion of examining Alysa A. Ruddell, Ph.D., Tr. 88–91, undermines the ALJ's determination because Drs. Wheeler and Ruddell opined the plaintiff had marked mental limitations in several domains, including completing a normal work day and work week without interruptions from psychologically based symptoms.¹ Moreover, this harmful error calls into question the ALJ's evaluation of the medical evidence of mental limitations, plaintiff's mental-health testimony, the lay statements on mental limitations, and the assessed RFC. The Court reverses the ALJ's decision and remands for further administrative proceedings with direction that the ALJ reexamine Dr. Wheeler's November 2016 opinion, evaluate in the first instance Dr. Ruddell's October 2018 opinion, and consider the medical and testimonial evidence in light of any newly submitted evidence and the

¹ By extension, the ALJ also harmfully erred by discounting the opinion of non-examining, reviewing psychologist Brian VanFossen, Ph.D., who affirmed Dr. Wheeler's conclusions regarding plaintiff's marked mental limitations. *See* Tr. 78, 1381–85.

1 evidence submitted to the Appeals Council, which indicates that since the date of the ALJ's
2 decision plaintiff's physical pain has become less severe.

3 **1. Opinions of Examining Psychologists Drs. Wheeler and Ruddell**

4 Plaintiff contends that the ALJ failed to cite specific and legitimate reasons for
5 discounting the opinion of examining psychologist Dr. Wheeler, and the opinion of examining
6 psychologist Dr. Ruddell submitted to the Appeals Council undermines the ALJ's decision. The
7 Court agrees.

8 For applications filed before March 27, 2017, as this one was, more weight should
9 generally be given to the opinions of examining doctors than to the opinions of doctors who do
10 not examine or treat the claimant. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995); *see* 20
11 C.F.R. § 404.1527(c)(2); SSR 96-2p (rescinded by Federal Register Notice Vol. 82, No. 57, page
12 15263, effective March 27, 2017). Here the ALJ favored the opinions of non-examining agency
13 psychiatrist Eugene Kester, M.D., and of non-examining agency psychologist Christmas Covell,
14 Ph.D., over the opinion of examining psychologist Dr. Wheeler. The Appeals Council denied
15 review despite examining psychologist Dr. Ruddell's opinion. *See* Tr. 2, 77–78. The Court
16 therefore examines whether the examining opinions of Dr. Wheeler was rejected for specific and
17 legitimate reasons that are supported by substantial evidence, *Lester*, 81 F.3d at 830. “The
18 opinion of a nonexamining physician cannot by itself constitute substantial evidence that justifies
19 the rejection of the opinion of . . . an examining physician . . .” *Id.* The Court must also address
20 whether Dr. Ruddell's opinion undermines the ALJ's determination. *See Ramirez v. Shalala*, 8
21 F.3d 1449, 1451-52 (9th Cir. 1993) (the court may consider new evidence submitted for the first
22 time to the Appeals Council in determining whether the ALJ's decision is supported by
23 substantial evidence).

1 In November 2016, Dr. Wheeler examined plaintiff and based her opinion on the
2 examination, her February 2014 psychological examination of plaintiff, and DSHS case notes.
3 Tr. 1376. Dr. Wheeler opined that plaintiff had marked limitations in adapting to changes in a
4 routine work setting, communicating and performing effectively in a work setting, and
5 completing a normal work day and work week without interruptions from psychologically based
6 symptoms; and concluded that plaintiff's overall severity rating was marked. Tr. 1378–79. In the
7 mental status exam, Dr. Wheeler noted that plaintiff's mood was anxious; she held a lot of
8 muscle tension, particularly around the throat/neck/jaw when feeling anxious and was fidgety in
9 her chair; her thought process was both within normal limits and was not within normal limits
10 given her persistently anxious thoughts; her memory was and was not intact “[g]iven the
11 disruption in her mentation when anxious, likely can be forgetful in work setting”; and her
12 concentration was not within normal limits because she was math impaired, had difficulty
13 spelling words backwards, and memory was impaired and dropped with flares in anxiety. Tr.
14 1379–80. The ALJ rejected Dr. Wheeler's opinion that plaintiff suffered from any marked
15 mental limitations as (1) not supported by the mental status examination; (2) supported only by
16 plaintiff's subjective complaints in which plaintiff herself acknowledged “medium” symptoms;
17 and (3) conflicting with the non-examining opinions of Drs. Kester and Covell. Tr. 78. None of
18 these were specific and legitimate reasons for rejecting Dr. Wheeler's opinion that plaintiff
19 suffered from marked mental limitations in several domains.

20 First, the ALJ erred by determining that Dr. Wheeler's conclusions were not supported by
21 the mental status examination. Dr. Wheeler determined that plaintiff was not within normal
22 limits with respect to mood, attitude and behavior, thought process and content, memory, and
23 concentration, and specifically noted that anxiety disrupted plaintiff's mentation and suggested

1 that she would likely be forgetful in a work setting. Tr. 1379–80. Dr. Wheeler’s mental status
2 examination is consistent with the medical record that shows documented concerns in these
3 domains. For example, in September 2018, her psychiatrist Katharine Danner, M.D., noted “I am
4 increasingly concerned about her memory.” Tr. 100. Similarly, in December 2018, her counselor
5 noted that “[c]lient presented as tearful, which is the client[’]s baseline . . . client also indicated
6 recent [suicidal ideation] which she called the police and crisis line for.” Tr. 138.

7 Second, the ALJ made the unreasonable inference that because plaintiff referred to her
8 symptoms of *depression* as “like medium, I guess,” Tr. 1377, any and all mental symptoms were
9 unequivocally moderate despite Dr. Wheeler’s clear focus on marked *anxiety* symptoms and
10 years of mental-health records that suggest far more than medium anxiety and agoraphobia
11 symptoms, suicidal ideation, and documented suicide attempts in 2014 and 2019. Tr. 1378–79;
12 *see, e.g.*, Tr. 100 (psychiatrist noting concerns about memory), Tr. 138 (noting recent suicidal
13 ideation and baseline as tearful), Tr. 195 (documenting 2019 suicide attempt), Tr. 204–05 (in
14 2019 psychiatrist noting concern about short-term memory loss and documenting auditory
15 hallucinations), Tr. 1155 (documenting 2014 suicide attempt). For example, in February 2017,
16 plaintiff’s treating physician noted that plaintiff suffered from severe anxiety but that he would
17 not prescribe benzodiazepines because plaintiff had used them in a suicide attempt before. Tr.
18 1451. Similarly, during a May 2017 mental status examination, plaintiff was noted to have
19 compulsions, phobias, and obsessions, and was observed to have poor attention, poor
20 concentration, impaired short-term memory, and poor insight and judgment. Tr. 1533. Even if
21 plaintiff in a single instance described her symptoms of depression as “medium, I guess,” such a
22 description is contradicted by years of records showing severe, chronic mental-health symptoms
23 that have involved hospitalization and regular medication.

1 Third, the ALJ gave undue weight to the opinions of non-examining psychiatrist Dr.
2 Kester and non-examining psychologist Dr. Covell, who both dismissed Dr. Wheeler’s 2016
3 opinion with boilerplate language, stating that it relied too heavily on plaintiff’s subjective
4 complaints, and was inconsistent with the mental status examination and the “totality of the
5 evidence.” Tr. 77; *see* Tr. 326, 360. Although the ALJ correctly noted that no treating source on
6 record stated that plaintiff’s mental health would prevent her from working full-time, Tr. 77, it is
7 also true that plaintiff’s treatment history does not contradict a finding of disability. Despite no
8 explicit treating statement regarding mental functional capacity, years of treatment records
9 document severe psychological disturbances, the opinions of Drs. Wheeler and Ruddell state that
10 plaintiff is markedly limited in the ability to work full-time, and another, independent, May 2017
11 mental status examination observed that plaintiff suffered from poor attention, poor
12 concentration, impaired short-term memory, and poor insight and judgment. *See* Tr. 87–91,
13 1376–80, 1533. In this regard, Dr. Ruddell's post-hearing opinion undermines the ALJ's
14 determination.

15 The ALJ’s other reasons for giving the opinions of Drs. Kester and Covell great weight
16 are based on unreasonable medical presumptions that are unsupported by the record. The ALJ
17 stated “[t]he consultant opinions are also generally consistent with the statements from BHR that
18 the claimant has showed a desire for secondary gains that may be received by remaining
19 disordered.” Tr. 77. This single reference, taken out-of-context, suggests that plaintiff has been
20 exaggerating her symptoms, perhaps for financial gain, but that is an unreasonable presumption
21 in light of that treatment note and the totality of the record. In February 2017, plaintiff’s
22 counselor referred to a possible *therapeutic intervention* that could be employed twice per month
23 to address plaintiff’s presenting problem of panic disorder and agoraphobia:

1 Assess for secondary gains [plaintiff] may be receiving by
2 remaining disordered w/panic and/or agoraphobia (e.g.,
attention/co-dependency, care-receiving, avoidance of activity);
3 directly address gains if evident.

4 Tr. 1434. That is, the counselor noted that it might prove therapeutic to directly address with
5 plaintiff whether her severe symptoms result in emotionally or materially rewarding outcomes
6 (attention, care-receiving, avoidance of activity) because such comforting “secondary gains”
7 could inhibit strategies to alleviate anxiety. Nowhere did the counselor suggest that plaintiff’s
8 mental symptoms were less severe than plaintiff claims; and nowhere in the record do treatment
9 providers or examiners suggest doubt in plaintiff’s subjective complaints about the severity of
10 her anxiety. Similarly it was unreasonable for the ALJ to presume that plaintiff has exaggerated
11 her mental health limitations because she testified that counseling was helping her or that her
12 presentation during physical examinations did not generally show her to be anxious. Tr. 77.
13 Mental health counseling is designed to be helpful such that the fact that it is indeed helpful does
14 not suggest in-and-of-itself that a claimant no longer suffers from debilitating symptoms. That a
15 general practice physician examining plaintiff’s continuing back and neck pain notes in a
16 perfunctory fashion that plaintiff was “[c]ooperative, appropriate mood and affect” does not
17 undermine years of mental-health specialists’ treatment records that demonstrate severe anxiety,
18 a baseline of being tearful, and concerns about memory. *Compare* Tr. 1826 with Tr. 100, 138;
19 *see generally* 20 C.F.R. § 404.1527(c)(5) (“We generally give more weight to the medical
20 opinion of a specialist about medical issues related to his or her area of specialty than to the
21 medical opinion of a source who is not a specialist.”). Moreover, the ALJ self-testified to an
22 unsubstantiated medical conclusion:

23 She stated she has agoraphobia, but she also stated she is able to
leave her home to seek treatment. If she can leave to seek
treatment, she can leave to go to work.

1 Tr. 77. None of plaintiff's mental-health providers have suggested that plaintiff's agoraphobia is
2 non-severe or imaginary because plaintiff is able to attend treatment appointments, and the ALJ
3 cited no authority for the proposition that agoraphobia can contribute to debilitating mental
4 health symptoms only if a claimant is unable to attend mental-health treatment.

5 In October 2018, i.e., after the ALJ hearing but before the ALJ's decision, Dr. Ruddell
6 examined plaintiff and opined that she was markedly severe for anxiety and insomnia, and was
7 moderately severe for depression, health problems, and social relationships. Tr. 88. Dr. Ruddell
8 concluded that plaintiff had overall limitations of marked severity with marked limitations in
9 understanding, remembering, and persisting in tasks by following detailed instructions; learning
10 new tasks; adapting to changes in a routine work setting; completing a normal work day and
11 work week without interruptions from psychologically based symptoms; and setting realistic
12 goals and planning independently. Tr. 89. In the mental status examination, Dr. Ruddell observed
13 that plaintiff was restless; had a nervous, scared or hypervigilant affect; had an anxious mood;
14 was paranoid; had concentration impaired on serial 3's; had impaired abstract thinking in two
15 domains; and had no insight into her own condition. Tr. 90. The Appeals Council found that Dr.
16 Ruddell's opinion did not show a reasonable probability that it would change the outcome of the
17 decision, presumably relying on the ALJ's reasoning for discounting Dr. Wheeler's 2016
18 opinion. Tr. 2. For the reasons stated earlier with respect to Dr. Wheeler's opinion, the Court
19 finds that Dr. Ruddell's opinion undermines the ALJ's determination and is also grounds for
20 remand.

21 The Court finds the ALJ failed to support with substantial evidence the decision to
22 discount the examining opinions of Dr. Wheeler and that the opinion of Dr. Ruddell undermines
23 the ALJ's disability determination. This constituted harmful error because plaintiff could have

1 been found to be disabled had their opinions regarding the severity of plaintiff's mental
2 limitations been properly considered.

3 **2. Plaintiff's Testimony, Lay Statements, RFC**

4 Plaintiff contends that the ALJ misevaluated plaintiff's testimony, the lay statements, and
5 RFC. The Court agrees because the ALJ misevaluated the critical opinions of examining Dr.
6 Wheeler and the opinion of Dr. Ruddell undermines the disability determination. Because those
7 opinions must be reevaluated in light of the voluminous mental-health treatment records,
8 plaintiff's testimony, lay statements, and RFC must also be reevaluated on remand.

9 **3. Remand for Further Administrative Proceedings**

10 Plaintiff contends that this case should be reversed and remanded for an award of benefits
11 based on the credit-as-true standard. The Court disagrees.

12 Usually, "[i]f additional proceedings can remedy defects in the original administrative
13 proceeding, a social security case should be remanded." *Lewin v. Schweiker*, 654 F.2d 631, 635
14 9th Cir. 1981). The Ninth Circuit has, however, devised a three-part credit-as-true standard,
15 which must be satisfied in order for a court to remand to the ALJ with instructions to calculate
16 and award benefits:

17 (1) the record has been fully developed and further administrative
18 proceedings would serve no useful purpose; (2) the ALJ has failed
19 to provide legally sufficient reasons for rejecting evidence,
20 whether claimant testimony or medical opinion; and (3) if the
21 improperly discredited evidence were credited as true, the ALJ
22 would be required to find the claimant disabled on remand.

23 *Garrison v. Colvin*, 759 F.3d 995, 1019 (9th Cir. 2014). Here, the ALJ has not yet had the
opportunity to review the extensive records supplied to the Appeals Council and further
administrative proceedings will help to clarify the severity of plaintiff's mental *and* physical
limitations. Although plaintiff has broadly challenged both the physical and mental RFC, she has

1 failed to demonstrate how the ALJ's physical RFC assessment was erroneous and has, in fact,
2 presented to the Appeals Council medical evidence suggesting that plaintiff's physical
3 impairments have since become less severe. In April 2019, plaintiff's treating psychologist Dr.
4 Danner noted: "On a positive note, her back surgery went very well and she is now pain free. She
5 is not using any pain medication other than [L]yrica at this time." Tr. 186. During in-patient
6 admission after a May 2019 suicide attempt, plaintiff stated that her chronic back pain had been
7 alleviated by surgery to remove a lumbar cyst. Tr. 14. Moreover, as the ALJ noted, no treatment
8 provider has opined directly regarding plaintiff's mental functional capacity. Remanding for
9 further administrative proceedings will allow the ALJ to reevaluate the examining opinions of
10 Drs. Wheeler and Ruddell, to assess in the first instance all the evidence that was presented to the
11 Appeals Council, and to supplement the record regarding the severity of plaintiff's mental and
12 physical limitations.

13 CONCLUSION

14 For the foregoing reasons, the Commissioner's decision is **REVERSED**, and this case is
15 **REMANDED** for further administrative proceedings under sentence four of 42 U.S.C. § 405(g).

16 On remand, the ALJ should reexamine Dr. Wheeler's November 2016 opinion, evaluate
17 in the first instance Dr. Ruddell's October 2018 opinion, and consider the medical and
18 testimonial evidence in light of any newly submitted evidence and the evidence submitted to the
19 Appeals Council, which indicates that since the date of the ALJ's decision plaintiff's physical
20 pain has become less severe.

21 DATED this 7th day of May, 2021.

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BRIAN A. TSUCHIDA
United States Magistrate Judge